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Reflections on Women and Native Title

By Cynthia Ganesharajah, Research Officer and Pip McCourt, Aurora Intern

The role of women in native title processes is an area which has received limited attention in native title literature. In some circles, there exists a predominant view that women have been excluded from native title in Australia, that they are marginalised, inadequately represented and play minimal roles in negotiations.¹ A key question is whether this view is based on the lacunae in native title literature rather than an examination of past and present native title processes.

As Ciaran O'Faircheallaigh highlighted in his presentation to the Native Title Conference 2009, many women have played a prominent role in native title and mining agreement negotiations both in Australia and internationally.² In particular, O'Faircheallaigh discussed the strong and influential participation of women in the Argyle Diamond Mine negotiations in the Kimberley region of Western Australia.³ In considering the role of women, he pointed out that it is important to look beyond the people who are sitting at the negotiating table. Just because women are not the public face of native title negotiations does not mean that they have had no input into or influence over the native title claim.

¹ See for example G Gibson and D Kemp, 'Corporate engagement with indigenous women in the minerals industry' in C O'Faircheallaigh and S Ali (eds) *Earth Matters: Indigenous peoples, the extractive industries and corporate social responsibility*, Sheffield, UK, 2008.

² C O'Faircheallaigh, 'Indigenous Women and Mining Agreement Negotiations in Australia and Canada', presentation to the National Native Title Conference 2009, Melbourne, 5 June 2009.

³ Ibid.

Women may often be involved in setting the agenda for negotiations and the ongoing implementation of native title agreements.

It is important to acknowledge that the potential exists for women to be under-represented in native title processes. This potential stems, in part, from the misunderstanding among some non-Indigenous persons that men hold primary responsibility for land in Aboriginal societies. Early anthropological research into Aboriginal society in Australia was primarily conducted by male anthropologists working with Aboriginal men and tended to view women as the primary bearers of cultural and spiritual knowledge.⁴ However, the work of a number of influential anthropologists and researchers has allowed a greater understanding of the key roles that Aboriginal women hold in these areas, even when it is not immediately visible to outsiders.⁵

Because of these assumptions, non-Indigenous people involved in native title may fail to recognise how Indigenous women can and should be involved. This has had implications for the methods and mechanisms through which women present evidence in litigated claims in both the native title and land rights frameworks. Some have argued for a more flexible approach to evidence laws so that Aboriginal women have the opportunity to speak and show evidence on *their* terms.⁶

According to O'Faircheallaigh, another interrelated, but slightly different, factor is the nature of the processes surrounding native title. A process which is inclusive, 'open', and mobilises the entire community will provide opportunities for women to get involved. It will also have a significantly positive impact on the benefits generated by a native title agreement.⁷

⁴ C Wohlan, *Aboriginal Women's Interests in Customary Law Recognition*, Background Paper 13, Law Reform Commission of Western Australia, Perth, 2005, p.515

⁵ See for example D Bird-Rose, '[Women and Land Claims](#)', *Land, Rights Laws: Issues of Native Title*, no. 6, January 1995; M Langton, 'Grandmother's Law, Company Business and Succession in Changing Aboriginal Land Tenure Systems,' in G Yunupingu (ed) *Our Land is Our Life: Land Rights Past, Present and Future*, University of Queensland Press, St Lucia, Queensland, 1997, pp.86-87; and D Bell, *Daughters of the Dreaming*, McPhee Gribble, Melbourne, 1983.

⁶ Bird Rose, *ibid* p.7.

⁷ O'Faircheallaigh, above n2.

What is AIATSIS doing?



Since 2007 an Indigenous Women's Talking Circle has become a permanent part of the annual Native Title Conference. The Circle gives Indigenous women the opportunity to meet together to discuss their perspectives and roles in the native title process and in the sustenance of culture and nurturing indigenous identities. Discussions have centered on

indigenous representation, leadership, economic development and mining agreement negotiations.

Participants from the Talking Circles have called for an increase in Aboriginal women's leadership roles. This would create greater equity in the native title process. Key themes from the Talking Circles include:

- Women's leadership comes from their confidence in knowing country and culture.
- Women feel their role is undervalued and want a greater say in what happens in their country.
- Women want to encourage younger women to be involved with native title processes.
- Women leaders need support, respect and recognition from their families as well as from the community.

Specific recommendations have also been made to AIATSIS about how it can increase women's involvement in native title. These include:

- AIATSIS to hold a national interim Native Title Conference dealing specifically with Aboriginal and Torres Strait Islander women on issues within the Native Title Framework.
- AIATSIS to establish a special fund to increase participation of Indigenous women at all future Native Title Conferences.
- AIATSIS to consider the importance of discussing the role of Aboriginal and Torres Strait Islander women in Prescribed Bodies Corporate as part of the Native Title Conference.

Conclusion

There is a clear need for much more research into Indigenous women's participation in native title. It is important that this research does not over generalise and recognises that each woman may have a difference

experience. It is also important to investigate Indigenous women's own perceptions about their involvement in native title. Would they characterise themselves as being excluded?

More broadly, further research is required on the participation levels of a range of interest groups involved in native title. For example, do native title negotiations involving discussions about health and wellbeing initiatives include or consult health workers? Another example is the involvement of youth. A key concern in native title is capacity building for future generations and succession planning, but does the native title process allow for the inclusion of youth representatives?

Aboriginal and Torres Strait Islander women are undoubtedly an integral part of their communities and it important to ensure that they are given the opportunity to participate in all areas of native title.

Section 223: Thoughts of an Intern

By Madeleine Rowley, Aurora Intern

Section s223 of the *Native Title Act 1993* (Cth) has been twisted into a barbed wire fence that most native title applicants can not surmount. Judicial interpretation of the section has led to the development of an increasingly onerous and complex test that all litigated native title claims must pass to be successful.⁸ Section 223 provides a definition of native title, stating that native title rights and interests are those rights and interests that are 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the Indigenous claimants.⁹ The courts have held that this requires claimants to prove that the laws and customs currently acknowledged and observed have been continually practised, without substantial interruption, since sovereignty.¹⁰ This places an impossibly heavy evidentiary burden on native title claimants.¹¹

⁸ Kent McNeill *Emerging Justice: Essays on Land Rights in Canada and Australia* (2000), 80; see also Simon Young 'The Trouble with Tradition' (2001) 30 *Western Australian Law Review*, 48.

⁹ *Native Title Act 1993* (Cth), s223(a).

¹⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45]-[47], [50], [58]-[61], [79].

¹¹ Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* 45 (2003),